

1 STEPHEN H. SILVER, SBN 038241  
2 RICHARD A. LEVINE, SBN 091671  
3 JACOB A. KALINSKI, SBN 233709  
4 SILVER, HADDEN, SILVER, WEXLER & LEVINE  
5 1428 Second Street, Suite 200  
6 P.O. Box 2161  
7 Santa Monica, CA 90407-2161  
8 Telephone: (310) 393-1486  
9 Facsimile: (310) 395-5801

10 Attorneys for Plaintiffs/Petitioners San Jose Retired  
11 Employees Association, Howard E. Fleming,  
12 Donald S. Macrae, Frances J. Olson, Gary J. Richert  
13 and Rosalinda Navarro

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **FOR THE COUNTY OF SANTA CLARA**

16 SAN JOSE POLICE OFFICERS'  
17 ASSOCIATION,

18 Plaintiff,

19 v.

20 CITY OF SAN JOSE, BOARD OF  
21 ADMINISTRATION FOR POLICE  
22 AND FIRE DEPARTMENT  
23 RETIREMENT PLAN OF CITY OF  
24 SAN JOSE, and DOES 1-10, inclusive,

25 Defendants.

26 AND RELATED CROSS-COMPLAINT  
27 AND CONSOLIDATED ACTIONS.

) Lead Consolidated Case No. 1-12-CV-225926  
) (Consolidated Actions 1-12-CV-225928,  
) 1-12-CV-226570, 1-12-CV-226574,  
) 1-12-CV-227864 and 1-12-CV-233660)

) (Hon. Patricia M. Lucas, Dept. 2)

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES OF SAN JOSE RETIRED**  
) **EMPLOYEES ASSOCIATION, HOWARD**  
) **E. FLEMING, DONALD S. MACRAE,**  
) **FRANCES J. OLSON, GARY J. RICHERT**  
) **AND ROSALINDA NAVARRO IN**  
) **OPPOSITION TO MOTION FOR**  
) **SUMMARY ADJUDICATION OF ISSUES**

) Date: June 7, 2013

) Time: 9:00 a.m.

) Dept.: 2

) Complaint Filed: June 6, 2012

) Trial Date in Consolidated Actions:

) July 22, 2013

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. THE CITY IS NOT EMPOWERED TO DESTROY OR  
REDUCE BENEFITS HERETOFORE PROVIDED TO RETIREES..... 2

III. MEASURE B IMPAIRED THE VESTED RIGHTS OF RETIREES  
REPRESENTED BY SJREA TO HAVE THE CITY COUNCIL  
MAINTAIN THE SRBR AND PROPERLY EXERCISE ITS  
DISCRETION AS TO WHEN TO DISTRIBUTE FUNDS..... 6

IV. CONCLUSION..... 13

## TABLE OF AUTHORITIES

### **Cases**

<i>Abbott v. City of Los Angeles</i> (1958) 50 Cal.2d 438.....	5, 6
<i>Allen v. Board of Administration of the Public Employees Retirement System</i> (1983) 34 Cal.3d 114.....	5, 6
<i>Allen v. City of Long Beach</i> (1955) 45 Cal.2d 128 .....	5, 6
<i>Arden Carmichael, Inc. v. County of Sacramento</i> (2001) 93 Cal.App.4th 507 .....	4
<i>Bettencourt v. City and County of San Francisco</i> (2007) 146 Cal.App.4th 1090 .....	3
<i>Breslin v. City and County of San Francisco</i> (2007) 146 Cal.App.4th 1064, .....	3
<i>Doyle v. City of Medford</i> (9 <sup>th</sup> Cir. 2010) 606 F.3d 667.....	11, 12
<i>International Ass’n. of Firefighters Local 145 v. City of San Diego</i> (1983) 34 Cal.3d 292.....	5
<i>Kobzoff v. Los Angeles County Harbor/UCLA Medical Center</i> (1998) 19 Cal. 4th 851.....	3
<i>Legislature v. Eu</i> (1991) 54 Cal.3d 492.....	5
<i>Lyon v. Flournoy</i> (1969) 271 Cal.App.2d 774.....	5
<i>Mares v. Baughman</i> (2001) 92 Cal.App.4th 672.....	3
<i>People v. One 1940 Ford V-8 Coupe</i> (1950) 36 Cal.2d 471.....	3
<i>People v. Birkett</i> (1999) 21 Cal.4th 226 .....	5
<i>People v. Rizo</i> (2000) 22 Cal.4th 681 .....	5
<i>Retired Employees Association of Orange County, Inc. v.</i> <i>County of Orange</i> (“ <i>REAOC</i> ”) (2012 U.S. Dist.) LEXIS 146637.....	12
<i>Storek and Storek, Inc. v. Citicorp Real Estate, Inc.</i> (2002) 100 Cal.App.4th 44 .....	9
<i>Teachers’ Retirement Bd. v. Genest</i> (2007) 155 Cal.App.4th 1012 .....	10
<i>Terry v. City of Berkeley</i> (1953) 21 Cal.2d 698.....	6
<i>Third Story Music, Inc. v. Waits</i> (1995) 41 Cal.App.4th 798 .....	9
<i>Ventura County Retired Employees’ Association Inc. v. County of Ventura</i> (1991) 228 Cal.App.3d 1594.....	12
<i>Walsh v. Board of Administration</i> (1992) 4 Cal.App.4th 682 .....	5
<i>White v. Ultramar, Inc.</i> (1999) 21 Cal.4th 563.....	3

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Statutes**

California Probate Code	
Section 16080.....	9
Section 16081.....	9
Section 16082.....	9

**Other Authorities**

58 Cal.Jur.3d, Statutes, §§ 83-88 .....	3
58 Cal.Jur.3d, <i>supra</i> , §§ 90-91 .....	3

San Jose City Charter

Section 1500 of the City Charter .....	2, 5, 10
Section 1501 .....	2
Section 1503.....	2
Section 1505.....	2
Section 1511-A .....	6, 10

San Jose Municipal Code

Section 3.28.340.....	12
Section 3.28.340(A)(2)(a).....	11
SJMC Section 3.28.340(A)(2)(b).....	8
SJMC Section 3.28.340(C)(2).....	7
SJMC Section 3.28.340(E)(1).....	7

**Treatises**

2A N. Singer, <i>Statutes and Statutory Construction</i> (6th ed. 2000), § 46:06.) .....	4
--	---

**Constitutional Provisions**

California Consitution

Article 16. ....	12
Article 16 Section 17(a).....	9

1     **I.     INTRODUCTION**

2             The City's Motion for Summary Adjudication of Issues ("MSA") was submitted before  
3     the original lawsuit filed by the San Jose Retired Employees Association and various named  
4     Plaintiffs (hereinafter collectively referred to as "SJREA") was included in the Consolidated  
5     Action. As a result, the MSA does not seek summary adjudication of or specifically address  
6     any cause of action set forth in the SJREA Complaint. Presumably because certain issues  
7     raised in the City's MSA could, as a practical matter, adversely impact claims presented by  
8     SJREA in its Complaint, this Court allowed SJREA to submit an Opposition to the MSA on or  
9     before May 8, 2013.

10            This Opposition will focus only on three subjects related to the MSA: (1) whether the  
11     MSA is procedurally defective; (2) the nature and extent of the rights possessed by retired  
12     officers and employees (and their eligible beneficiaries), who are members of the Federated  
13     City Employees' Retirement System ("the Plan"); and, (3) did Measure B impair the vested  
14     right to require the City Council members, in their capacities as fiduciaries of the SRBR funds,  
15     to exercise discretion each year as to whether to distribute available funds from the SRBR in  
16     accordance with the provisions of the SRBR as set forth in the City's Municipal Code.

17            To avoid unnecessary duplication of effort, SJREA will not repeat or re-assert many of  
18     the relevant, well articulated and persuasive arguments presented by the other Plaintiffs.  
19     Instead, it will simply join in the pertinent parts of the Oppositions those Plaintiffs filed and,  
20     where appropriate, expand upon or supplement those assertions.

21            Regarding the contention that the MSA must be denied for procedural defects, SJREA  
22     will simply join in the three Oppositions previously submitted by other Plaintiffs in this  
23     Consolidated Action as follows. With respect to the Opposition filed by the San Jose Police  
24     Officers Association ("POA"), SJREA joins in those portions of Section III that appear at page  
25     4, line 6 through page 5, line 15 and page 6, line 4 through page 7, line 2. SJREA also joins in  
26     Section III-A of the Opposition submitted by AFSCME Local 101 ("AFSCME") appearing at  
27     page 9, line 12 through page 11, line 11 and Section I of the Opposition submitted by Plaintiffs  
28     Robert Sapien, *et al.* (hereinafter collectively referred to as Sapien) appearing at page 2, line 5

1 through page 7, line 3.

2 SJREA will now proceed to address the remaining two issues described above that  
3 impact the retired individuals or their eligible beneficiaries it represents.

4 **II. THE CITY IS NOT EMPOWERED TO DESTROY OR REDUCE BENEFITS**  
5 **HERETOFORE PROVIDED TO RETIREES.**

6 Again, to avoid unnecessary duplication of effort and for the sake of brevity, SJREA  
7 will join in the following portions of the Oppositions submitted by the other Plaintiffs. With  
8 respect to the Opposition submitted by the POA, SJREA joins in Section IV from page 7, line 3  
9 to page 18, line 28. SJREA also joins in Sections III-B and III-C of the Opposition submitted  
10 by AFSCME from page 11, line 12 through page 25, line 19 and Section II of the Opposition  
11 submitted by Sapien from page 7, line 4 through page 13, line 24.

12 In the unlikely event that this Court should reject the persuasive arguments and  
13 authorities presented by the other Plaintiffs and determine that Section 1500 *et seq.* of the City  
14 Charter empowered the City to reduce or eliminate already earned and/or granted retirement  
15 benefits by amending or otherwise changing a retirement plan or adopting or establishing a new  
16 or different plan, that empowerment only could affect active officers or employees, not the  
17 retirement benefits already provided and/or earned by former officers or employees (or their  
18 eligible beneficiaries) who were retired when Measure B was enacted. For example, Section  
19 1500 of the City Charter, which is quoted in the MSA at page 16, lines 4-8, provides as  
20 follows:

21 “Except as hereinafter otherwise provided, the Council shall provide, by  
22 ordinance or ordinances, for the creation, establishment and maintenance of a  
23 retirement plan or plans for all officers and employees of the City. Such plan or  
24 plans need not be the same for all officers and employees. Subject to other  
25 provisions of this Article, the Council may at any time, or from time to time,  
26 amend or otherwise change any retirement plan or plans or adopt or establish a  
27 new or different plan or plans for all or any **officers or employees.**” (City’s  
28 Separate Statement of Undisputed Material Facts (“SSUMF”) # 46; SJREA’s  
Request For Judicial Notice (“RJN”), Exhibit 1, Emphasis added.)

Similar specific language referencing only officers or employees appears in City  
Charter Sections 1501, 1503 and 1505. (SJREA’s Additional Facts (“SJREAAF”) #s 1-3; RJN,

1 Exhibit 1.) Because these provisions clearly limit any such empowerment to officers or  
2 employees, as opposed to retired members, the City's "reservation of rights" argument has no  
3 bearing on the retirement benefits already received by individuals who were retired at the time  
4 Measure B took effect or their eligible beneficiaries. Consequently, it does not provide  
5 authorization for the alterations contained in Measure B which are the subject of the Complaint  
6 filed by SJREA.

7 "Under general settled canons of statutory construction, we ascertain the  
8 Legislature's intent in order to effectuate the law's purpose. [Citation.] We must  
9 look to the statute's words and give them their 'usual and ordinary meaning.'  
10 [Citation.] The statute's plain meaning controls the court's interpretation unless  
its words are ambiguous. If the plain language of a statute is unambiguous, no  
court need, or should, go beyond that pure expression of legislative intent."

11 *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, quoting *Kobzoff v. Los Angeles County*  
12 *Harbor/UCLA Medical Center* (1998) 19 Cal. 4th 851, 861; see also 58 Cal.Jur.3d, Statutes,  
13 §§ 83-88, 171.

14 "We seek to ascertain the Legislature's intent so that we may effectuate the law's  
15 purpose. Our goal is to interpret the language of the statute --not to insert what  
16 has been omitted or omit what has been inserted. We look first to the language  
17 of the statute itself, read as a whole, seeking to harmonize parts of a statutory  
scheme. **If the words contained in the statute are reasonably free from  
ambiguity and uncertainty, we look no further than those words to  
ascertain the provision's meaning.** [Citation.]" (Emphasis added.)

18 *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1100.

19 "In construing the statutory provisions a court is not authorized to insert  
20 qualifying provisions not included and may not rewrite the statute to conform to  
21 an assumed intention which does not appear from its language. The court is  
limited to the intention expressed. [Citations.]"

22 *Mares v. Baughman* (2001) 92 Cal.App.4th 672, 677, quoting *People v. One 1940 Ford V-8*  
23 *Coupe* (1950) 36 Cal.2d 471, 475; see also 58 Cal.Jur.3d, *supra*, §§ 90-91.

24 "When we interpret a statute, we must avoid an interpretation that would render terms  
25 surplusage. Instead, we seek to give every word some significance, leaving no part useless or  
26 devoid of meaning." (*Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th  
27 1064, 1081.) "While every word of a statute must be presumed to have been used for a  
28 purpose, **it is also the case that every word excluded from a statute must be presumed to**

1 **have been excluded for a purpose.”** (*Arden Carmichael, Inc. v. County of Sacramento* (2001)  
2 93 Cal.App.4th 507, 516; see also 2A N. Singer, *Statutes and Statutory Construction* (6th ed.  
3 2000), § 46:06.) (Emphasis added.)

4 An application of these clear principles of statutory construction compels the conclusion  
5 that any reserved power to amend is confined to benefits earned by current officers or  
6 employees, **not those already provided to retirees or their eligible beneficiaries.**

7 Measure B itself clearly articulates an intent **not** to reduce or impact any benefits  
8 already possessed by retirees at the time of its enactment. In particular, Section 1502-A  
9 entitled **INTENT** (which the City quotes, without citing, at page 2, lines 17-20) expressly  
10 states in its fourth and fifth paragraphs:

11 \* \* \*

12 \* \* \*

13 \* \* \*

14 “This Act is not intended to deprive any current or **former employees** of  
15 benefits earned and accrued for prior service as of the time of the Act’s effective  
16 date; rather, **the Act is intended to preserve earned benefits as of the effective**  
17 **date of the Act.**

18 This Act is **not intended to reduce the pension amounts received by any**  
19 **retiree** or to take away any cost-of-living increases paid to retirees as of the  
20 effective date of the Act.” (SJREAAF # 4; RJN, Exhibit 2, Emphasis added.)

21 This unequivocal intent **not** to reduce, or even impact, the retirement benefits provided  
22 to individuals who were retired at the time Measure B took effect, or their eligible retirees, is  
23 even more clearly reflected in the Argument submitted in favor of Measure B, a copy of which  
24 is attached hereto as Exhibit A, that was signed by the City’s Mayor, among others. In  
25 particular, the fourth paragraph of the proponents’ Argument states:

26 \* \* \*

27 \* \* \*

28 \* \* \*

“Measure B would protect retirement benefits already earned by current  
employees but would reduce the cost to the city by making changes going  
forward. **It would not cut current payments to retirees. . . .**” (SJREAAF # 5;  
RJN, Exhibit 3, Emphasis added.)



1 It is well-established that in construing voter initiative language “we refer to other  
2 indicia of voter’s intent, particularly the analyses in arguments contained in the official  
3 pamphlet.” *People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Birkett* (1999) 21 Cal.4th 226,  
4 243.

5 From the foregoing, it is abundantly apparent that any rights the City may have reserved  
6 under Sections 1500 *et seq.* of the City Charter to amend or change any retirement plan or  
7 establish a new or different plan **only** pertained to current officers or employees. Nothing in  
8 the City Charter or any other lawful enactment in any way stated that the retirement benefits  
9 awarded to retirees could thereafter be amended or changed or that any benefits earned by  
10 current employees could be amended or changed after they retired.

11 The City has cited no authority for the proposition that, **after retirement**, earned and/or  
12 provided benefits can be reduced or eliminated. All of the authorities relied upon by the City  
13 involve either (1) the reserved right to alter benefits **prior to retirement** (*Walsh v. Board of*  
14 *Administration* (1992) 4 Cal.App.4th 682 (*cf. Legislature v. Eu* (1991) 54 Cal.3d 492), (2) the  
15 refusal to provide retirees with windfalls that bore no relation to the benefits actually earned  
16 (*Allen v. Board of Administration of the Public Employees Retirement System* (1983) 34 Cal.3d  
17 114 and *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774), and (3) enforcing **prior to retirement**  
18 a condition attached to the earned vested right, *i.e.*, increased retirement contributions  
19 recommended by the plan’s actuary (*International Ass’n. of Firefighters Local 145 v. City of*  
20 *San Diego* (1983) 34 Cal.3d 292). The City has cited no cases (and our research has not  
21 disclosed the existence of any cases) that permit the reduction or elimination of retirement  
22 benefits already provided to retirees or their eligible dependents.

23 Interestingly, as the other Plaintiffs’ Oppositions clearly explain (and the City  
24 acknowledges, at page 13, lines 10-18), the leading cases of *Allen v. City of Long Beach* (1955)  
25 45 Cal.2d 128, 131 and *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 488-89, limited the  
26 ability to make changes in a pension plan to those which bear some “reasonable relation to the  
27 theory of a pension system and its successful operation, and changes in a pension plan which  
28 result in disadvantages to **employees** should be accompanied by comparable new advantages.”

1 (Emphasis added.) Thus, even permissible amendments which must be accompanied by  
2 comparable new advantages only can occur with respect to **employees, not retirees.**

3 This concept was clearly recognized in *Allen v. Board of Administration of the Public*  
4 *Employees Retirement System, supra*, 34 Cal. 114, 120, upon which the City strongly relies,  
5 when, after quoting the above language from *Allen v. City of Long Beach* and *Abbott v. City of*  
6 *Los Angeles*, the Supreme Court observed:

7 “As to retired employees, the scope of continuing governmental power may be  
8 more restricted, the retiree being entitled to the fulfillment of the contract which  
he already has performed without detrimental modification. [Citation.]”

9 Actually, this proposition had previously been solidified by the California  
10 Supreme Court in *Terry v. City of Berkeley* (1953) 21 Cal.2d 698, 702-03. That opinion  
11 emphasized that any changes that are permissible before retirement cannot occur once  
12 an individual has actually retired, where the employee had “rendered the called-for  
13 performance; . . . had done everything possible to entitle him to the payment of the  
14 pension and all conditions precedent to the obligation of the city were fulfilled upon the  
15 determination that he be retired as a result of the service-connected disability.”

16 Consequently, for all the reasons set forth above, SJREA strongly urges this Court to  
17 conclude that nothing in the City Charter empowered the City to reduce or alter the pension  
18 benefits already provided to those individuals represented by SJREA who had retired as of the  
19 date Measure B took effect or their eligible beneficiaries.

20 **III. MEASURE B IMPAIRED THE VESTED RIGHTS OF RETIREES**  
21 **REPRESENTED BY SJREA TO HAVE THE CITY COUNCIL MAINTAIN THE**  
22 **SRBR AND PROPERLY EXERCISE ITS DISCRETION AS TO WHEN TO**  
23 **DISTRIBUTE FUNDS.**

24 SJREA joins in Section V, at page 19, lines 1 through 13, and page 33, line 1 through  
25 page 35, line 4 of the POA Opposition; Section III-D3 from page 31, line 14 through page 36,  
26 line 6 of the AFSCME Opposition; and Section II-D from page 17, line 14 through page 18,  
27 line 12 of the Sapien Opposition.

28 Section 1511-A of Measure B states:

1 “The Supplemental Retiree Benefit Reserve (“SRBR”) shall be discontinued,  
2 and the assets returned to the appropriate retirement trust fund. Any  
supplemental payments to retirees in addition to the benefits authorized herein  
shall not be funded from plan assets.” (City’s SSUMF # 42.)

3 The City claims that it is free to abolish the SRBR with respect to Plan members  
4 because the City has discretion as to whether to make SRBR distributions. The City vastly  
5 overstates its discretion with respect to the SRBR, which is limited to **when**, not **if**,  
6 distributions from the SRBR shall be made. The City abolished the SRBR in order to divert its  
7 assets so as to reduce the City’s current and future obligation to fund entitled benefits.  
8 However, the San Jose Municipal Code (“SJMC”) mandates that those assets shall be used only  
9 “for the benefit of retired members, survivors of members, and survivors of retired members”  
10 (SJMC Section 3.28.340(E)(1)<sup>1</sup>). (SJREAAF # 6; RJN, Exhibit 4.)

11 The City’s interpretation of the relevant sections of the SJMC is flawed, as a plain  
12 reading of SJMC Section 3.28.340 reveals. The City established the SRBR for Plan members  
13 on or about June 3, 1986. The purpose of the SRBR was to provide additional payments or  
14 other benefits to retired members, survivors of members, and survivors of retired members.  
15 (SJMC Section 3.28.340(E)(1).) The terms governing the SRBR are set forth in SJMC  
16 Sections 3.28.300, *et seq.* and particularly Section 3.28.340.

17 SJMC Section 3.28.340(A)(2) states:

18 “a. The board **shall** credit to the supplemental retire (sic) benefit reserve all  
19 interest payable pursuant to subsection C. below and that portion of the excess  
20 earnings determined pursuant to subsection D. below.

21 b. Distributions from the supplemental retiree benefit reserve **shall** be made in  
22 accordance with subsection E. below.” (SJREAAF # 6; RJN, Exhibit 4,  
Emphasis added.)

23 SJMC Section 3.28.340(C)(2) reads in pertinent part:

24 “Interest **shall** be credited to the supplemental retiree benefit reserve at the  
25 actuarially assumed annual rate adopted by the board pursuant to Section  
26 3.28.200 or at the actual rate of return earned by the retirement fund during the  
27 applicable fiscal year, whichever is lower. Interest credited to the supplemental  
retiree benefit reserve **shall** be calculated as though the transfer of excess  
earnings required by subsection D. had been made on July 1 of the calendar

28 <sup>1</sup> All references to SJMC Section 3.28.340 refer to the section as it existed prior to the passage of Measure B.

1 year, regardless of the actual date such transfer is made.” (SJREAAF # 6; RJN,  
2 Exhibit 4, Emphasis added.)

3 SJMC Section 3.28.340(D)(2) provides in pertinent part:

4 “If the balance remaining in the income account is greater than zero, the board  
5 **shall** by written resolution declare that balance to be the excess earnings for the  
6 applicable fiscal year, **shall** transfer ten percent of the excess earnings to the  
supplemental retiree benefit reserve, and shall transfer the remaining ninety  
percent of the excess earnings to the general reserve.” (SJREAAF # 6; RJN,  
Exhibit 4, Emphasis added.)

7 Based upon this mandatory language, the City has absolutely no discretion with respect  
8 to the establishment and funding of the SRBR. Further, pursuant to SJMC Section  
9 3.28.340(A)(2)(b), the City has no discretion whatsoever to refrain from making any  
10 distributions. The only discretion the City maintains is **when** to provide distributions from the  
11 SRBR.

12 SJMC Section 3.28.340(E)(2) provides in pertinent part:

13 “Upon request of the city council or on its own motion, the board **may** make  
14 recommendations to the city council regarding the distribution, **if any**, of the  
15 supplemental retiree benefit reserve to retired members, survivors of members,  
16 and survivors or retired members. The city council, after consideration of the  
17 recommendation of the board, **shall** determine the distribution, **if any**, of the  
supplemental retiree benefit reserve to said persons.” (SJREAAF # 6; RJN,  
Exhibit 4, Emphasis added.)

18 The term “if any” in the SJMC Section 3.28.340(E)(2) shows that, following any given  
19 motion or recommendation made by the Board or the City Council, the City Council is not  
20 required to authorize a distribution. However, as evidenced by the presence of the word “shall”  
21 in SJMC Section 3.28.240(E)(2), upon any such motion or recommendation, retired members  
22 and their survivors are **entitled to a determination** by the City Council as to whether it will  
23 authorize the particular recommended distribution at that time. This conclusion is supported by  
24 the fact that, in contrast to SJMC Section 3.28.240(E)(2), the phrase “if any” does not appear in  
25 SJMC Section 3.28.340(A)(2)(b).

26 As set forth in the Opposition to the MSA filed by AFSCME, just because the City  
27 Council has “discretion to ‘determine the distribution,’ it does not mean that a contractual  
28 obligation does not arise. Under California law, an obligation under a contract is not illusory if

1 the obligated party's discretion must be exercised with reasonableness or good faith. (*Storek*  
2 *and Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 61; *Third Story Music,*  
3 *Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806 ('the implied covenant of good faith is also  
4 applied to contradict an express contractual grant of discretion when necessary to protect an  
5 agreement which otherwise would be rendered illusory and unenforceable'.))" (AFSCME  
6 Opposition 33:15-22.)

7 California Constitution Article 16 Section 17(a) provides in pertinent part:

8 "(a) . . . **The assets of a public pension or retirement system are trust funds**  
9 and shall be held for the exclusive purposes of providing benefits to participants  
10 in the pension or retirement system and their beneficiaries and defraying  
reasonable expenses of administering the system." (Emphasis added.)

11 The SRBR is a separate trust whose beneficiaries are retired members and their  
12 survivors. Under the terms of the Plan, the governing body of the City, its City Council, is the  
13 trustee, charged with making distributions from the trust to the retired members and their  
14 survivors at times within their discretion.

15 The City contends that, because there are no concrete established times when the City  
16 Council is required to make distributions, it then is authorized to abolish the trust and convert  
17 the funds for its own purposes. Certainly, no trustee could justify such conduct. California  
18 Probate Code Section 16080 provides: "Except as provided in Section 16081, a discretionary  
19 power conferred upon a trustee is not left to the trustee's arbitrary discretion, but shall be  
20 exercised reasonably." California Probate Code Section 16081 states:

21 "(a) Subject to the additional requirements of subdivisions (b), (c), and (d), if a  
22 trust instrument confers 'absolute,' 'sole,' or 'uncontrolled' discretion on a  
trustee, the trustee shall act in accordance with fiduciary principles and shall not  
23 act in bad faith or in disregard of the purposes of the trust.

24 (b) Notwithstanding the use of terms like 'absolute,' 'sole,' or 'uncontrolled' by  
a settlor or a testator, a person who is a beneficiary of a trust that permits the  
25 person, either individually or as trustee or cotrustee, to make discretionary  
distributions of income or principal to or for the benefit of himself or herself  
26 pursuant to a standard, shall exercise that power reasonably and in accordance  
with the standard."

27 Most importantly, California Probate Code Section 16082 states: "Except as otherwise  
28 specifically provided in the trust instrument, a person who holds a power to appoint or

1 distribute income or principal to or for the benefit of others, either as an individual or as a  
2 trustee, may not use the power to discharge the legal obligations of the person holding the  
3 power.”

4 The City, as trustee for the SRBR funds, cannot lawfully do what no other trustee in the  
5 state of California could do, *i.e.*, abolish a trust and convert the funds of that trust for its own  
6 use.

7 Previously, the City filed a demurrer to SJREA’s Complaint where it contended that  
8 Section 1511-A of Measure B was not ripe for adjudication because “Plaintiffs do not claim  
9 any right to supplemental payments.” The demurrer was overruled by Judge Kirwan in  
10 Department 8. (RJN, Exhibit 5.)

11 In opposing that demurrer, SJREA emphasized that, in order to find that vested rights  
12 have been impaired, it was not necessary to establish that the retirees it represents and their  
13 eligible beneficiaries actually suffered monetary loss. The failure to contribute funds pursuant  
14 to a mandatory prescribed formula has been found to be an impairment of a vested right. In  
15 *Teachers’ Retirement Bd. v. Genest* (2007) 155 Cal.App.4th 1012 (“*TRB*”), the Teachers’  
16 Retirement Board challenged legislation that sought to reduce the State’s obligation to fund the  
17 Supplemental Benefit Maintenance Account of the Teachers’ Retirement Fund (“SBMA”) by  
18 \$500 million. By an earlier statute, the Legislature had granted association members a vested  
19 right to have the State make an appropriation equal to 2.5 percent of the total of the creditable  
20 compensation of the immediately preceding calendar year upon which members’ contributions  
21 were based for purposes of funding the SBMA. (*Id.* at 1022.)

22 The challenged bill in *TRB* provided for an actuarial evaluation to be made every four  
23 years of the anticipated liability of the SBMA. If the evaluation disclosed that the funds in the  
24 SBMA would be insufficient, then money would be appropriated from the General Fund to  
25 cover the shortfall. (*Id.* at 1023.) The Court summarized that what the Legislature had done  
26 was to replace a \$500 million obligation with a contingent obligation to transfer the sum to the  
27 SBMA over a 33 year period, conditioned upon a determination by an actuary establishing that  
28 this sum or any portion thereof is needed to meet the purchasing power protection benefit

1 obligations in any year between 2006 and 2036. If any actuary determines that the SBMA is  
2 able to provide 80 percent purchasing power protection until July 2036, (and the operative  
3 period was not extended) then the \$500 million the Legislature deducted from its obligation to  
4 fund the SBMA would never be reimbursed. (*Id.* at 1024.) The Court held that reducing the  
5 income stream available to pay the supplemental benefits by \$500 million increases the risk to  
6 members that SBMA funds will be insufficient to make the supplemental benefit payments in  
7 the future, and that since the challenged bill did not compensate members for this increased risk  
8 or provide some comparable new advantage, it impaired contractual rights in violation of the  
9 state and federal Constitutions. (*Id.* at 1039.)

10 Likewise, in our case, Section 3.28.340(A)(2)(a) of the SJMC similarly requires the  
11 City to contribute funds to the SRBR pursuant to a mandatory prescribed formula as set forth in  
12 paragraphs C and D. Here too, funds are being shifted from a specific fund that was to be used  
13 only to make supplemental benefits to retirees and their beneficiaries. As Measure B abolishes  
14 the SRBR, it necessarily precludes funds from being contributed to the SRBR. Further,  
15 Measure B makes it a certainty that the funds which were to be used solely for retirees and their  
16 beneficiaries will not be, and in so doing has impaired retirees' vested rights.

17 The cases cited by the City in support of its contention that its discretion regarding  
18 distributions prevents the creating of vested rights with respect to the SRBR are easily  
19 distinguished. *Doyle v. City of Medford* (9<sup>th</sup> Cir. 2010) 606 F.3d 667, 669 involved a **due**  
20 **process** (not a contract impairment) challenge to the following language: "The governing body  
21 of any local government that contracts for or otherwise makes available health care insurance  
22 coverage for officers and employe[e]s of the local government may, in so far as [sic] and to the  
23 extent possible, make that coverage available for retired officers and employe[e]s of the local  
24 government and for spouses and unmarried children under 18 years of age of those retired

25 ///

26 ///

27 ///

28 ///

1 officers and employe[e]s.”<sup>2</sup> The language “in so far as and to the extent possible” is a far cry  
2 from the SRBR’s mandates for funds to contribute to a special fund to be used only for retirees  
3 and their benefits. Further, as *Doyle* analyzed whether or not Plaintiffs had a property interest  
4 which required due process, it was analyzed under the framework of whether there was a  
5 particularized standard. (*Id.* at 672.)

6 *Retired Employees Association of Orange County, Inc. v. County of Orange* (“*REAOC*”)  
7 (2012 U.S. Dist.) LEXIS 146637 does not deal with analogous facts to our case. There, the  
8 court weighed whether Plaintiffs had a vested right to a pooling methodology where ordinances  
9 had granted the usage of such methodology for specific periods only. (*Id.* at 7.) The situation  
10 in *REAOC* is far different from ours because there was no mandate for the County to provide  
11 for any future pooling methodology because the court found no implied promise of continued  
12 funding. (*Id.* at 29.) Section 3.28.340 certainly mandates continued funding. It is only the  
13 timing of distributions that is left to the discretion of the City.

14 Finally, as stated in AFSCME’s Opposition to the MSA (at page 34, lines 11-15), the  
15 court in *Ventura County Retired Employees’ Association Inc. v. County of Ventura* (1991) 228  
16 Cal.App.3d 1594, 1599, merely held that the county was “not compelled to offer retirees and  
17 active employees a health plan funded by a single and uniform premium to both groups of  
18 insureds,” since such a benefit was not mandated by law. Here, the benefit is mandated by  
19 ordinance and regulated under Article 16 of the Constitution.

20 Consequently, Measure B impairs the rights of individuals represented by SJREA to  
21 have the City maintain the SRBR funds and, when requested, periodically exercise its  
22 discretion in good faith as to whether and to what extent those funds should be distributed to  
23 retirees and eligible dependents on that particular occasion.

24 ///

25  
26  
27 <sup>2</sup> The statute at issue in *Doyle*, Oregon Revised Statutes section 243.303(2), used the term “officers and  
28 employe[e]s.” However, the term “officers and employe[e]s” clearly did not refer to **retired officers and employees** as evidenced by the different treatment of retired officers and employees in that statute. This provides further support for the contention that the term “officers and employees” without any reference to “retired” or “former” officers or employees does not include retired officers or employees in the San Jose City Charter.



1 **IV. CONCLUSION**

2 For all the reasons set forth above, we respectfully urge the Court to deny the City's  
3 MSA.

4 Respectfully submitted,

5 SILVER, HADDEN, SILVER, WEXLER & LEVINE

6  
7 Date: May 8, 2013

8 By Stephen H. Silver  
STEPHEN H. SILVER

9 Attorneys for Plaintiffs/Petitioners San Jose Retired  
10 Employees Association, Howard E. Fleming, Donald S.  
11 Macrae, Frances J. Olson, Gary J. Richert and Rosalinda  
12 Navarro  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On May 8, 2013, I served the document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES OF SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT AND ROSALINDA NAVARRO IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION OF ISSUES** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth on the attached service list:

☒ [By Electronic Mail] I caused the document(s) to be transmitted to the addressee(s) via electronic mail at the addresses listed on the attached Service List.

☒ [By Overnight Delivery] I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service

Executed on May 8, 2013, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

LISA L. HILL

  
SIGNATURE

## SERVICE LIST

Gregg M. Adam  
[gadam@cbmlaw.com](mailto:gadam@cbmlaw.com)

Jonathan Yank

[jyank@cbmlaw.com](mailto:jyank@cbmlaw.com)

Gonzalo C. Martinez

[gmartinez@cbmlaw.com](mailto:gmartinez@cbmlaw.com)

Amber West

[awest@cbmlaw.com](mailto:awest@cbmlaw.com)

Carroll Burdick & McDonough LLP

44 Montgomery Street, Suite 400

San Francisco CA 94104

John A. McBride

[jmcbride@wmpirlaw.com](mailto:jmcbride@wmpirlaw.com)

Christopher E. Platten

[cplatten@wmpirlaw.com](mailto:cplatten@wmpirlaw.com)

Wylie McBride Platten & Renner

2125 Canoas Garden Avenue, Suite 120

San Jose, CA 95125-2124

Harvey L. Leiderman

[hleiderman@reedsmith.com](mailto:hleiderman@reedsmith.com)

Jeffrey R. Rieger

[jrieger@reedsmith.com](mailto:jrieger@reedsmith.com)

Reed Smith LLP

101 Second Street, Suite 1800

San Francisco, CA 94105-3659

Teague P. Paterson

[tpaterson@beesontayer.com](mailto:tpaterson@beesontayer.com)

Vishtasp M. Soroushian

[vsoroushian@beesontayer.com](mailto:vsoroushian@beesontayer.com)

Beeson Taylor & Bodine APC

Ross House, Suite 200

483 Ninth Street

Oakland, CA 94612

Arthur A. Hartinger

[ahartinger@meyersnave.com](mailto:ahartinger@meyersnave.com)

Linda Ross

[lross@meyersnave.com](mailto:lross@meyersnave.com)

Meyers Nave Riback Silver & Wilson

555 12th Street, Suite 1500

Oakland, CA 94607

George Nathan Jaeger

[njaeger@natejaeger.com](mailto:njaeger@natejaeger.com)

15118 San Jose Street

Mission Hills, CA 91345